any services for the companies or either of them. Nor could it be said that the companies paid him the salaries on an ex gratia basis. But he needed these amounts for his livelihood and expenditure and he therefore drew these amounts from the companies; he said he would refund to the companies whatever amount awarded as loss of earnings. In my view, these amounts could be regarded as advances made to him by the companies in the form of a loan or moneys wrongfully taken by a director without any authority – there was no evidence of any board resolutions passed authorizing such payments. In either case he was under an obligation to refund to the companies the amounts received by him. In my opinion, no credit ought to be given for these amounts drawn by him in assessing his loss of earnings.

The next question is the quantum of the loss of earnings. According to medical evidence, the plaintiff was not well for the period from the date of accident to 15 July 1980. Dr William Fung, the consultant orthopaedic surgeon of Tan Tock Seng Hospital, said that the plaintiff was incapacitated from work until that date. Up to that time, he had a plaster cast and he was immobilized. The plaintiff had sustained a compound comminuted fracture of the mid-shafts of the left tibia and fibula. On 19 May 1980 or thereabout he was advised to undergo an operation as there were signs of non-union of the fracture. Accordingly, he went through an operation on or about that date. He was discharged on 8 June 1980, and thereafter he received treatment as an outpatient. It was suggested that while he was in plaster cast he could move from home to office and other places and work. But Dr Fung said that he was not wholly fit and even if he was seated he would still have pain and that it was not easy for him to get about in a plaster. It seems to me that for the period from the date of accident to 15 July 1980 he could not really work effectively as a director of his companies. I therefore considered this period as a reasonable one for the purpose of calculating the quantum of loss of earnings. During this period the loss he had sustained in terms of salary from PSL amounted to $32,741.94 calculated at $2,000 pm. As for SML, no salary was drawn for the period after June 1980 at the company was not doing well. I allowed a sum of $7,935.48 representing his loss of salary from that company for the period up to June 1980 at $500 per month. To these amounts totalling $40,677.42 were added the respective amounts of contribution to the Central Provident Fund, thus making a total sum of $48,629.19 which I awarded as special damages for loss of earnings.

Order accordingly.

Solicitors: *Mallal & Namazie*; *Goh Poh & Partners*; *Lee & Lee.*

Reported by *Ng Sheau Jiuan*

Re Pek Chuan Development Pte Ltd

HIGH COURT (SINGAPORE) – COMPANIES WINDING UP NO 379 OF 1985
CHAN SEK KEONG JC
7 MAY 1988

Companies and Corporations – Winding up of company – Setting aside petition for winding up for want of prosecution – Delay of company in filing affidavit in opposition – Whether petitioner under duty to obtain hearing date – Whether company adversely affected by petition – Companies Act (Cap 50, 1985 Ed), ss 254(1)(i), 257(2), 285 – Companies (Winding-Up) Rules 1969, r 30(1)

In this case, a company, Pek Chuan Development Pte Ltd ('the company'), applied to set aside a winding-up petition for want of prosecution. The company was incorporated on 17 April 1978 with an authorized capital of $5,000,000 divided into 5,000,000 shares of $1 each. The main object of the company is property development. Clause 4 of the memorandum of association specifically provided that certain things could not be done with regard to the corporate existence or character of the company, its shares or a piece of land at Lavender Street/Kallang Bahru ('the URA land') without the prior consent of the Urban Redevelopment Authority ('URA'). The issued capital of the company was $1,500,000 divided into 1,500,000 shares of which, at the date of the petition, about 30% was owned by Tai Hua Food Industries, 15% by Kuah Hong Kheng ('the petitioner') and about 55% by Pek Seng Company Pte Ltd. The majority shareholders were controlled by one Pek Tiong Seng ('PTS') who consequently became the managing director of the company.

The company was successful in bidding for a piece of land offered by the URA and a contract for sale was signed on 10 July 1978. The company completed the development of a building on the URA land known as Pek Chuan Building consisting of eight shop units and 17 office units. At the date of the petition, ie 24 July 1985, seven units remained unsold. In or about early 1982, the minority shareholders began to be dissatisfied with the way in which PTS conducted the affairs of the company. On 3 April 1984, one Phua Beng Tee, the managing director of Tai Hua Food Industries, filed a winding-up petition in CWU no 104 of 1984 on the ground that it was just and equitable to wind up the company. This petition was subsequently dismissed by consent of the parties.

However, on 24 July 1985, the petitioner filed another petition, the subject matter of this motion, to wind up the company, again on the ground that it was just and equitable to do so under s 254(1)(i) of the Companies Act. When the petition came on for hearing on 11 October 1985 on a normal motion day, it was adjourned to a special date for hearing to be fixed by mutual consent of the parties. On that day, the company had not filed any affidavit in opposition to the petition. After the adjournment, many events took place between 28 November 1985 and 11 March 1988. The company's motion to set aside the petition for winding up the company was heard on 28 and 29 March 1988. Both the company and the petitioners blamed each other for the delay.

Held, dismissing the application: (1) As a general rule, winding-up proceedings should be heard expeditiously even where a company is solvent on the business of a company.

(2) On the evidence, both parties had wittingly or unwittingly contributed to the delay in the hearing of the petition and any injury caused to the company was caused by both of them, although not necessarily in the same proportion.

(3) The proper and just order to make was to dismiss the motion, each party paying its own costs.

(4) An early hearing of the petition was ordered.

Cases referred to

1 *Re Chapel House Colliery Co* (1883) 24 Ch D 259 (refd)
2 *Birkett* v *James* [1977] 2 All ER 801 (follld)
3 *Austin Securities Ltd* v *Northgate & English Stores Ltd* [1969] 2 All ER 753 (follld)

Legislation referred to

Companies Act (Cap 50, 1985 Ed) ss 254(1)(i), 257(2), 285
Companies (Winding-Up) Rules 1969 r 30(1)

KS Chung for the respondents/appellants.
Alan Wong for the petitioners/respondents.

Cur Adv Vult

Chan Sek Keong JC: This was an application by way of motion by a company viz Pek Chuan Development Pte Ltd ('the company') to set aside a winding-up petition for want of prosecution. At the conclusion of the hearing, I dismissed the application and said I would give reasons later. Here are my reasons.

A company called Pek Chuan Development Pte Ltd ('the company') was incorporated on 17 April 1978 with an authorized capital of $5,000,000 divided into 5,000,000 shares of $1 each. The main object of the company is property development. Clause 4 of the memorandum of association specifically provided that certain things could not be done with regard to the corporate existence or character of the company, its shares or a piece of land at Lavender Street/Kallang Bahru ('the URA land') without the prior consent of the Urban Redevelopment Authority ('URA').

The issued capital of the company was $1,500,000 divided into 1,500,000 shares of which, at the date of the petition, about 30% thereof was owned by Tai Hua Food Industries, 15% thereof by Kuah Hong Kheng ('the petitioners') and about 55% thereof by Pek Seng Company Pte Ltd. The majority shareholders was controlled by one Pek Tiong Seng ('PTS') who consequently became the managing director of the company.

The company was successful in bidding for a piece of land offered by the URA and a contract for sale was signed on 10 July 1978. The company completed the development of a building on the URA land known as Pek Chuan Building consisting of eight shop units and 17 office units. At the date of this petition, ie 24 July 1985, seven units remained unsold.

In or about early 1982, the minority shareholders began to be dissatisfied with the way in which PTS conducted the affairs of the company. On 3 April 1984, Phua Beng Tee, the managing director of Tai Hua Food Industries, filed a winding-up petition in CWU no 104 of 1984 on the ground that it was just and equitable to wind up the company. The specific grounds were:

(a) the improper investment of the company's funds in a project in Johore;
(b) the arbitrary removal of the powers of the minority directors to run the affairs of the company or to sign cheques;
(c) the improper payment of substantial salary, director's fees and bonus to PTS;
(d) the attempt by PTS to put the company into further debt by borrowing $4 million from United Overseas Bank Limited.

This petition was subsequently dismissed by consent of the parties. There was, in the course of argument in these proceedings, an issue as to whether the terms of the dismissal constituted res judicata.

The compromise did not lead to enduring peace between the parties. On 24 July 1985, the petitioner filed another petition, the subject matter of this motion, to wind up the company, again on the ground that it was just and equitable to do so under s 254(1)(i) of the Companies Act (Cap 50, 1985 Ed). The specific allegations in support of the petition are:

(a) PTS made an ultra vires payment;
(b) PTS procured the payment to himself, wrongfully, of a bonus of $245,703 notwithstanding counsel's opinion against it;
(c) PTS wrongfully paid himself a monthly salary of $6,000 pm;
(d) PTS's wilful default and refusal to answer the queries of shareholders;
(e) complete loss of confidence by the minority shareholders in PTS who continued to manage the company in an oppressive and high-handed manner;
(f) the extinguishment of the substratum of the company, which was the development for sale of Pek Chuan building;
(g) the company was analogous to a partnership;
(h) the misconduct of the directors as reported on 21 May 1987 by a firm Kaka Singh, an accountant firm of Touche Ross & Co, a firm of public accountants, upon an examination of the company's accounts.

The petition was endorsed with a date of hearing on 11 October 1985. The petition was served on the company and the Registrar of Companies on 26 July 1985, two days after its filing. All other requirements of the Companies (Winding-Up) Rules 1969 had been complied with.

When the petition came on for hearing on 11 October 1985 on a normal motion day, it was adjourned to a special date for hearing to be fixed by mutual consent of the parties. On that day, the company had not filed any affidavit in opposition to the petitioners. After the adjournment, the following events took place:

(1) 28 November 1985
Kuah Hong Kheng, a director, filed an application in

originating summons no 144 of 1986 for an order to inspect the accounting records of the company by an approved liquidator.

(2) 14 July 1986
Notice of change of solicitors filed by petitioners.

(3) 19 October 1986
Order made in terms of application in originating summons no 144 of 1986.

(4) 24 April 1987
The company filed an affidavit exhibiting three affidavits of PTS filed in CWU no 104 of 1984.

(5) 20 May 1987
Notice of change of solicitors for the petitioners filed.

(6) 20 May 1987
Notice of intention to proceed filed by new solicitors for petitioners.

(7) 28 May 1987
Company filed a motion to dismiss the petition without an accompanying affidavit. Motion fixed for hearing on 17 July 1987.

(8) 6 July 1987
PTS filed his affidavit in opposition to winding up of the company.

(9) 9 July 1987
Company filed affidavit of Susan Leong, a legal assistant in Chung & Co, their solicitors, setting out certain disputes and negotiations with the petitioners relating to the affairs of the company.

(10) 14 July 1987
Petitioners filed two affidavits in answer to PTS's affidavit of 6 July 1987.

(11) 17 July 1987
Hearing of motion to dismiss petition adjourned to another date on application of solicitors for the company and against the objection of solicitors for the petitioners.

(12) 28 August 1987
Company filed an ex parte application S/C no 5121/87 for an order pursuant to s 285 of the Act to examine Kaka Singh on the contents of his report dated 21 May 1987; hearing was adjourned for two weeks for application to be served on petitioners.

(13) 4 September 1987
Ex parte application S/C no 5121/87 served.

(14) 9 September 1987
Petitioners filed affidavit of Kuah Hong Kheng in reply to PTS's affidavit of 6 July 1987.

(15) 10 September 1987
Company's solicitors wrote to Registrar to vacate hearing date (ie 22 September 1987) of motion to dismiss; solicitors for petitioners objected.

(16) 11 September 1987
Hearing of ex parte application S/C no 5121/87 adjourned to a date to be fixed and for service of application on Touche Ross & Co.

(17) 11 September 1987
Company's solicitors wrote to petitioners' solicitors asking why petitioners were not proceeding with petition as more than two years had elapsed.

(18) 12 September 1987
Petitioners' solicitors replied that delay due to company making many applications, including application to dismiss the petition, and that petitioner would apply for hearing dates once motion to dismiss was withdrawn.

(19) 22 September 1987
Hearing of motion to dismiss petition again adjourned on application of company against objection of petitioners, with costs ordered against company.

(20) 3 December 1987
Motion to dismiss fixed for hearing on 28/29 March 1988.

(21) 23 February 1988
Company filed application (S/C no 1114/88) to remove affidavit of Kuah Hong Kheng dated 14 July 1987 or alternatively to strike out report of Touche Ross & Co.

(22) 26 February 1988
Hearing of ex parte application S/C no 5121/87 adjourned because application S/C no 1114/88 filed 23 February 1988 and affidavit of PTS filed 25 February 1988 served on 25 February 1988 at 11.25 am, one day before the hearing. Both applications S/C no 5121/87 and S/C no 1114/88 adjourned. No order as to costs.

(23) 1 March 1988
Petitioners filed application S/C no 1291/88 to strike out scandalous matter in affidavit of PTS of 25 February 1988.

(24) 11 March 1988
Order made in terms of application S/C no 1291/88.

(25) 28 – 29 March 1988
Hearing of motion to dismiss, when motion was dismissed, each party to pay own costs.

The substantial grounds advanced by the company in support of its motion were as follows:

(1) The petition was filed on 24 July 1985 and up to the date of hearing, ie 28 March 1988, the petitioner had not taken any steps to obtain a date for hearing.

(2) Notwithstanding this motion, and the company's requests to the petitioners to proceed, the petitioners had refused to obtain a date for hearing of the petition until the disposal of the motion; the petitioners had also refused the company's offer made on 25 February 1988 to withdraw this motion provided the petitioner undertook to restore the petition for hearing at an early date.

(3) Harm and injury had been done to the company as the company had to apply to court to sell three units in Pek Chuan Building against the objection of the petitioner.

(4) The petitioners' conduct (ie the delay and objecting to the sale of the three units and at the same time complaining that the company had not sold all the remaining units) showed that they were acting in bad faith and that the winding-up proceedings were commenced with a view to forcing PTS to purchase the shares of the petitioners in the company.

(5) The court should not allow a winding-up petition to stand over for a lengthy period as the company concerned is paralysed by it: *Re Chapel House Colliery Co*[1] (at p 268).

The substantial grounds of the petitioners in resisting the motion were as follows:

(1) The delay was due to the fault of PTS in failing to file his affidavit in opposition in accordance with r 30(1) of the Companies (Winding-Up) Rules 1969; the said affidavit was filed only after the motion to dismiss was filed.

(2) Delay on the company's part was due to two changes of solicitors which were rendered necessary by (a) the firm's solicitor's inability to act due to conflict of interest and (b) the solicitor's inability to communicate with the petitioners; and third set of new solicitors immediately gave notice to proceed and would have obtained a hearing date but for the filing of the motion to dismiss.

(3) On the facts, the petitioners were not guilty of inordinate and inexcusable delay, which had prejudiced a fair trial of the issues.

(4) The court should not dismiss the petition for want of prosecution where, as in this case, the petitioners would be entitled to file a fresh petition if the petitions were dismissed: *Birkett* v *James*.[2]

I agree with counsel for the company that, as a general rule, winding-up proceedings should be heard expeditiously even where, as here, a company is solvent on the business of company. In the case of a trading or manufacturing company, such proceedings may paralyse its business as suppliers and bankers may stop giving credit. Its whole existence is in doubt pending the disposal of the petition.

One would therefore have expected that in the present case, the company which was, as alleged, the most adversely affected of the parties concerned, would have acted speedily and with due diligence to have the petition disposed of, one way or the other. Yet, nothing of the sort happened. This company made no effort at all to cause the petition to be heard. It was not until 28 May 1987, ie about ten months after the filing of the petition, that it filed this motion to dismiss and that was done only in response to the petitioners filing the notice of intention to proceed. Even then, PTS's affidavit in opposition was not filed until 6 July 1987. Furthermore, the hearing of the motion to dismiss was adjourned twice on the application of the company. The inference I made then from these events was that the petition had not paralysed the business of the company nor had the prolonged adjournment adversely affected such business. No doubt the company applied to sell three units in Peh Chin Building but, in my view, this was only an inconvenience and not a hardship. The evidence in this case showed that the business of the company was property development, that it had completed the one development it had during this period and that it was carrying the remaining four unsold units as an investment. This explained why the business of the company had not been affected.

Counsel for the company contended that it was the duty of the petitioners to obtain a date for hearing and that the company had no such duty. Counsel for the petitioners accepted that the petitioners had no obligation to obtain a hearing date but contended that until the company had filed its affidavit in opposition, it would be premature to do so as, by analogy, the pleadings have not been completed. The reply of counsel for the company was that until a date of hearing had been fixed, the company was not obliged to file an affidavit in opposition. He referred to r 30(1) of the Companies (Winding-Up) Rules which reads as follows:

> (1) Affidavits in opposition to a petition for the winding up of a company shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.
>
> (2) Any affidavit in reply to an affidavit filed in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy thereof served on the party opposing the petition or his solicitor.

This contention of counsel for the company was based on a misapprehension of r 30(1). The time appointed for hearing of the petition was 11 October 1985. When the hearing of the petition was adjourned on that day, the company was already in breach of r 30. The company was therefore not free from blame for failing to file its affidavit in opposition.

Counsel for the company appeared to have been under the impression that in winding-up proceedings the company had no control over the said proceedings but could only respond to the moves of the petitioner and that the only way the company could get things moving was by filing this motion to dismiss for want of prosecution. Again, counsel was under a misapprehension as the company could have applied under s 257(2) of the Companies Act (Cap 50, 1985 Ed) which provides as follows:

(2) The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition –

(a) direct that any notices be given or any steps taken before or after the hearing of the petition;
(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules made thereunder, or by any prior order of the court;
(c) direct that oral evidence be taken on the petition or any matter relating thereto;
(d) direct a speedy hearing or trial of the petition or any issue of matter;
(e) allow the petition to be amended or withdrawn; and
(f) give such directions as to the proceedings as the court thinks fit.

Section 257(2) enables the parties in contested winding-up proceedings to obtain such orders as may be necessary to ensure that all preliminary matters have been finalized before the petition is fixed for hearing. There was no reason why the company could not have made an application for speedy trial of the petition at any time after the filing of the petition if it felt there was a need for it.

So much for the conduct of the company prior to the filing of the motion to dismiss. Its subsequent conduct was not much better as it did nothing to expedite the hearing. Indeed its conduct showed that the company was not ready, not only for the trial of the petition but also the motion itself.

The conduct of the petitioners was equally reprehensible. Between the date of filing of the petition and the filing of the notice of intention to proceed, nothing was done to bring the matter to trial. I had little doubt that inaction and delay on their part worked to their advantage. Their counsel contended (and here I must interpose to say that he was not responsible for the delay) that obtaining a date for hearing before the company had filed its affidavit in opposition would be premature and obtaining such a date after the motion to dismiss had been filed would have been presumptuous.

The contention was merely plausible as the petitioners had not explained why they could not have obtained a court order to direct the company to file its affidavit in opposition or for an early date for trial.

Accordingly, on the evidence, I found that both parties wittingly or unwittingly contributed to the delay in the hearing of this petition and that any injury caused to the company was caused by both of them, although not necessarily in the same proportion. As the interest of the company is, in such matters, the interest of the shareholders, no account need be taken of any injury to any other party.

In the circumstances, I was of the view that the proper and just order to make was to dismiss the motion with each party paying its own costs (see *Austin Securities Ltd* v *Northgate & English Stores Ltd*[3]) but at the same time to order an early trial of the petition.

Counsel for the petitioners contended that even if the petitioners had been guilty of inordinate and inexcusable delay and had thereby caused prejudice to the company, the court should not dismiss the petition as it would not prevent the petitioner from filing a fresh petition. He relied on the rule laid down by the House of Lords in *Birkett* v *James*.[2] Counsel for the company contended that that decision had no application to winding-up proceedings.

In *Birkett* v *James*,[2] which was an action for damages for breach of an employment contract, it was held that if an action was dismissed for want of prosecution before the limitation period had expired, the court had no power, in the absence of special circumstances, to prevent the plaintiff starting a fresh action within the limitation period and proceeding with it with all proper diligence. Accordingly, in cases where the plaintiff was in a position to start a fresh action, this was a conclusive reason for refusing to dismiss the pending action for want of prosecution even where the plaintiff was guilty of inordinate and inexcusable delay. Otherwise, the commencement of a fresh action would aggravate any prejudice that had been caused already. The special circumstances mentioned by Lord Diplock as justifying a dismissal were: (1) intentional and contumacious conduct, ie where the plaintiffs had failed without cause to obey a peremptory order of court; and (2) abuse of process of court, eg where an action was a thin disguise of a previous action which had been abandoned.

In the course of argument, I expressed the view that I saw no reason why, in principle, the rule in *Birkett* v *James*[2] should not apply to winding-up proceedings, notwithstanding that winding-up proceedings are not subject to any limitation period. The question in each case would be whether in the circumstances, the petitioners would still be entitled to file a fresh petition on the same grounds if the existing petition were dismissed merely on the ground of want of prosecution. In the event, it was unnecessary for me to form a concluded view on the point, as I found both parties to have been guilty of delay.

Order accordingly.

Solicitors: *Chung & Co*; *Richard Ang & Co.*

Reported by *Wong Kim Fatt*